82-922

NO. _____

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FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NED LUTZ,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI (ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF OHIO)

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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Whether Petitioner was denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and under Section 2945.71 of the Ohio Revised Code?

II.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Ned Lutz, Petitioner

State of Ohio
By Fleet Freeman, Prosecuting Attorney,
Coshocton County, Ohio
401½ Main Street
Coshocton, Ohio 43812
614-622-3566

Attorney for Respondent

TABLE OF CONTENTS

	Page
Question Presented	1
List of All Parties to the Proceeding in the Court Whose Judgment is Sought To Be Reviewed	II
Table of Authorities	IV
Reference to the Official and Unofficial Reports of any Opinion Delivered in the Courts or Administrative Agency Below	1
Grounds on Which the Jurisdiction of this Court is Invoked	1
Opinion Below	2
Statement of the Case	4
Argument	7
Conclusion	9
Opinion of the Court of Appeals for Coshocton County, Ohio ..... Appendix A,	1a
Judgment Entry of The Court of Appeals of Coshocton County, Ohio ..... Appendix A,	11a
Entries from The Supreme Court of Ohio ..... Appendix B,	12a

TABLE OF AUTHORITIES

Statutes Cited: Page

Section 2945.71, Ohio Revised Code 7

28 U.S.C. Sec. 1257 (3) 2

Amendment VI, United States Constitution 2, 7

Amendment XIV, United States Constitution 3, 7

Section 2945.71 (C), Ohio Revised Code 3, 5

Section 2945.72, Ohio Revised Code 3, 5, 6

Section 2945.72 (E), Ohio Revised Code 3, 8

Section 2945.72 (H), Ohio Revised Code 3, 7

Rule 8 (B), Rules of Superintendence of The Supreme Court of Ohio 3, 6, 7, 8

Section 2921..02 (A), Ohio Revised Code 4

Cases Cited:

Klopfer v. *North Carolina,* 386 U.S. 213 (1967) 7

Barker v. *Wingo,* 407 U.S. 514 (1972) 7

Moore v. *Arizona,* 414 U.S. 25 (1973) 7

State v. *Reeser,* 63 Ohio St. 2d 189 (1980) 7

State v. *Pudlock,* 44 Ohio St. 2d 104 (1975) 7

State v. *Martin,* 56 Ohio St. 2d 289 (1978) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

NED LUTZ,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI (ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF OHIO)

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINION DELIVERED IN THE COURTS OR ADMINISTRATIVE AGENCY BELOW

The opinion delivered in the court below is not reported in any official or unofficial reports.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Ned Lutz is before this court on his petition for certiorari from the judgment of the Court of Appeals for

Coshocton County, Ohio, Fifth Appe' :e District, which affirmed the verdict and judgment of the Coshocton County Court of Common Pleas, on July 12, 1982, and from the judgments of the Supreme Court of the State of Ohio which overruled his motion for leave to appeal and dismissed his appeal as of right on October 6, 1982. He submits this Jurisdictional Statement to demonstrate this Court's jurisdiction for review by Writ of Certiorari pursuant to 28 U.S.C. Sec. 1257 (3).

There have been no orders respecting a re-hearing and no orders granting an extension of time within which to petition for certiorari.

OPINION BELOW

The opinion of the Court of Appeals for Coshocton County, Ohio, Fifth Appellate District (CA 81 18) is unreported, but is attached as Appendix A. The entries from the Supreme Court of the State of Ohio are attached as Appendix B.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

UNITED STATES CONSTITUTION AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2945.71 (C), Ohio Revised Code:

A person against whom a charge of felony is pending:

. . .

(2) Shall be brought to trial within two hundred seventy days after his arrest.

Section 2945.72, Ohio Revised Code:
The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

. . .

(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

. . .

(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion.

Rule 8 (B), Rules of Superintendence of The Supreme Court of Ohio:

(B) Criminal Trials. All criminal cases shall be tried

within six months of the date of arraingment on an indictment or information.

Any failure, and the reason therefor, to comply with the time limits specified in this rule shall be reported immediately to the Chief Justice of the Supreme Court by the administrative judge of the division in which such failure occurs. In a single-judge division such failure shall be reported by the judge. The Chief Justice is authorized to take such action as may be necessary to cause any such delinquent case to be tried forthwith.

Section 2921.02 (A), Ohio Revised Code:

No person, with purpose to corrupt a public servant or party official, or to influence him with respect to the discharge of his duty, whether before or after he is elected, appointed, qualified, employed, summoned, or sworn, shall promise, offer, or give any valuable thing or valuable benefit.

STATEMENT OF THE CASE

This is a criminal case.

Petitioner, Ned Lutz, was arrested on September 19, 1980, on an affidavit charging him with bribery under Section 2921.02 (A) filed in the Municipal Court of Coshocton County, Ohio. Petitioner was held in jail until bond was posted the same day. On October 1, 1980, the affidavit was dismissed by the Coshocton Municipal Court. On October 3, 1980, the Coshocton County, Ohio Grand Jury indicted Petitioner for the same offense. Petitioner was again arrested on October 9, 1980, and he spent part of such day in jail until bond was posted on the same day.

On October 21, 1980, Petitioner filed a motion to dismiss the indictment on grounds of double jeopardy, which motion was denied by the Common Pleas Court of Coshoc-

ton County, Ohio, on November 12, 1980. The case was then set for pretrial on May 27, 1981, and the matter was set for trial for June 16, 1981.

On June 10, 1981, the State of Ohio filed a motion with the trial court asking continuance of the cause for trial citing the absence of a State's witness who was not identified or shown to have been under subpoena by the State of Ohio. Without Petitioner's consent, and without hearing on such motion, the trial court granted such motion by judgment entry endorsed on such motion and set a new trial date of July 7, 1981.

On June 17, 1981, Petitioner filed his motion to dismiss the indictment for the reason that he had not been accorded a speedy trial. This motion was denied by the trial court on July 13, 1981. The trial commenced on July 14, 1982.

The trial court in overruling the Petitioner's motion to dismiss held that the eight (8) days between the dismissal of the affidavit in Coshocton Municipal Court and Petitioner's indictment by the Grand Jury could not be counted under Section 2945.71 (C) (2). The trial court further held that the twenty-one (21) days during which the trial court was considering Petitioner's motion to dismiss the indictment filed on October 21, 1980, extended the time for trial under Ohio Revised Code Section 2945.72. The trial court further held that the time period extending the trial date to July 7, 1981, occasioned by the State's request for continuance filed on June 10, 1981, was permitted under Ohio Revised Code Section 2945.72 as an extension for "the period of any reasonable continuance granted other than upon the accused's own motion " Such time period extended hearing date for twenty-one additional days. The trial court did not find that any such motions necessitated any delay in the hearing.

On appeal, the Court of Appeals for Coshocton County, Ohio, held that the eight (8) day time period between dismissal in the Municipal Court and the arrest on the indictment by the Grand Jury was time chargeable to the State under Ohio Revised Code Section 2945.71, but held that the twenty-one days the trial court considered Petitioner's motion to dismiss the indictment filed October 21, 1980, and the seventeen day extension of time for hearing on the State's motion for continuance filed June 10, 1981, was time chargeable to Petitioner under Ohio Revised Code Section 2945.72 and extended the time for trial accordingly.

The trial court and the Court of Appeals held that Ohio Supreme Court Superintendence Rule 8 did not entitle Petitioner to dismissal of the indictment.

As indicated above, the question presented by this petition was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

ARGUMENT

The Petitioner was denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and under Section 2945.71 of the Ohio Revised Code. Moreover, Rule 8 (B) of the Rules of Superintendence of the Supreme Court of Ohio was violated by Respondent.

The speedy trial provisions of the Sixth Amendment to the United States Constitution have been made applicable to the states through the Fourteenth Amendment to the United States Constitution. *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967). Petitioner's rights to a speedy trial were violated in this case under the standards set forth in *Barker* v. *Wingo,* 407 U.S. 514 (1972) and *Moore* v. *Arizona,* 414 U.S. 25 (1973).

In this case the State of Ohio filed a motion for continuance six days before the date set for trial. No witnesses were under subpoena; no name of any witness was given as being out of the country that was necessary to the prosecution, nor was there any time element given as to the return of such witness. By judgment entry endorsed on the motion prepared by the State of Ohio and without notice to or hearing opportunity given to Petitioner, the trial date was extended from June 16, 1981, to July 7, 1981. Such facts present a strong conclusion that there was not due diligence exercised in preparing the case for trial to commence on the date set. The State of Ohio was not, in good faith, attempting to try the case within the time limits set by the court for trial. Such delay should not be charged to Petitioner as a reasonable basis for continuance under Section 2945.72 (H) of the Ohio Revised Code. See *State* v. *Reeser,* 63 Ohio St. 2d 189 (1980); *State* v. *Pudlock,* 44 Ohio St. 2d 104 (1975).

A motion or pleading filed by a Defendant in a criminal case does not automatically trigger the permissible extension time for trial under Ohio Revised Code Section 2945.72 (E). Such a motion must be found to have necessitated a delay in the trial of the cause. A trial court does not have unbridled discretion concerning the amount of time it takes to rule on a defense motion. The twenty-one days during which the trial court was considering Petitioner's motion to dismiss the indictment filed on October 21, 1980, did not extend the trial time and the trial court did not specifically so find. Where the trial court did not find that the time in considering a defense motion to dismiss was a necessary delay in the trial date, the time for such disposition of such motion does not extend the trial time under Ohio Revised Code Section 2945.72 (E). *State* v. *Martin,* 56 Ohio St. 2d 289 (1978).

Rule 8 (B) of the Rules of Superintendence of the Supreme Court of Ohio requires the dismissal of the charge against the Petitioner as he was not tried within six months after the time of his arraignment. Merely because the rule does not specify the remedial procedure, a court is not prevented from instituting dismissal of the charge upon a finding of violation of the rule.

Considering the entire case in conjunction with the Sixth and Fourteenth Amendments to the United States Constitution and the pertinent sections of the Ohio Revised Code cited herein, Petitioner was denied his right to a speedy trial.

CONCLUSION

For the reasons stated, the question presented is substantial and is of great public importance. Petitioner respectfully requests this Court to require the State of Ohio to comply with the constitutional standards of the Sixth and Fourteenth Amendments to the United States Constitution and Section 2945.71 of the Ohio Revised Code, to reverse Petitioner's conviction, and to order the charge against him dismissed.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

(Filed July 12, 1982)

STATE OF OHIO,
Plaintiff-Appellee,

vs.

NED LUTZ,
Defendant-Appellant.

JUDGES:
Hon. Robert E. Henderson, P. J.
Hon. Norman J. Putman, J.
Hon. John R. Milligan, J.

OPINION

Case No. CA-81-18

Decided:————

APPEARANCES:

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ATTORNEY FOR DEFENDANT-APPELLANT

MILLIGAN, J.

The Bribery - Speedy Trial - "Valuable Benefit" Construed.

The defendant-appellant was sentenced following his conviction by a Coshocton County Common Pleas Court jury of bribery, R. C. Section 2921.02 (A). He appeals, charging six errors:

I. THE TRIAL COURT'S OVERRULING OF DEFENDANT'S MOTION TO DISMISS FOR FAILURE OF STATE TO COMPLY WITH O.R.C. 2945.71 AND RULE 8 OF SUPREME COURT OF OHIO SUPERINTENDENCE RULES WAS PREJUDICIAL ERROR.

II. THE TRIAL COURT ERRONEOUSLY OVERRULED THE DEFENDANTS MOTION

FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF THE DEFENDANT'S EVIDENCE.

III. THE FINDING OF GUILTY IN THIS MATTER IS AGAINST THE WEIGHT OF THE EVIDENCE; AND THE COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR ACQUITTAL.

IV. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE, OUR (SIC) OBJECTION OF THE DEFENDANT, AS TO LIQUOR VIOLATIONS WHICH CONSTITUTED HEARSAY (SIC); WHICH WERE IMMATERIAL TO THE ISSUES IN THIS CASE; WERE PREJUDICIAL TO THIS DEFENDANT WITH THE JURY; AND CONSTITUTED AN ABUSE OF DISCRETION.

V. COURT ERRONEOUSLY ADMITTED INTO EVIDENCE STATE EXHIBIT NO. 3 AND SAME WAS PREJUDICIAL ERROR.

VI. TRIAL COURT DENIED DEFENDANT'S COUNSEL THE OPPORTUNITY TO POINT OUT IN COUNSEL'S ARGUMENT TO THE JURY THE MATTER OF THE ABSENCE OF CERTAIN PERSONS AS WITNESSES IN THE CASE FOR THE PLAINTIFF AND WHAT ELEMENTS OF THE CASE SUCH WITNESSES COULD OFFER TESTIMONY. SUCH DENIAL WAS PREJUDICIAL ERROR.

From the evidence, the jury was entitled to believe that following a visit by a police officer (McKay) and a juvenile informant to a beer carryout store owned by the defendant's wife and another, where the defendant's wife was confronted with a claim of illegal sale of intoxicants to a juvenile, the defendant confronted another officer (Tatten – a shift commander lieutenant) and attempted to bribe him.

> "Q. What happened when you got out of your vehicle, Mr. Tatten, did you initiate any conversation?
>
> A. No sir. I stepped out of the car and Mr. Lutz aproached me and he said, 'I'm pissed at McKay.' He said, 'Those guys tried to set me up.' I assume he was referring to Officer McKay and Mathews. He said McKay had gotten into his face and had threatened his wife. He said they had threatened to arrest her and was very loud and belligerent. I had talked to the officers at the police station earlier, and because of this I asked Mr. Lutz, I said, it was my understanding that your wife was the only one that was loud. He said, well she is from the south, and she always talks that way. She may have been a little loud. He said, 'I'm going to go down Monday morning and file a complaint with the chief.' He said, 'I am also going to have my wife file charges on McKay.' He said, something about McKay leaving and saying fuck it. Then he said, 'If you stop these charges from going to the State Liquor Control Board,' he said, 'I'll stop my wife from filing charges on McKay.' He said that those charges, if those charges are filed, it's going to make you look bad. You are the shift lieutenant and you are responsible for these men. I don't want to get you in trouble, but it is your responsibility and it is going to make your officers look bad. He said, 'McKay is a punk kid and he is going to lose his job. I'll have his badge.' He says, 'It is going to

make the whole department look bad.' He says, 'I don't want to do it.' I said, 'Well, Mr. Lutz, if your wife has charges she is going to have to prove them to start off with.' I said, I am not going to interfere with my men's case. This is liquor business, and I'm not going to interfere. We'll look into your complaint though. He started to turn around and started to leave and go back towards his car. He turned around and he pointed back and he said, 'You take care of your end and I'll take care of mine. You stop those charges from going to the State and I won't file charges.' "
R-61, 62.

This evidence was corroborated.

I.

Speedy trial.

Did the clock run on this prosecution? The defendant argues he was not brought to trial (1) within the statutory proscriptions of legislative speedy trial, nor (2) within the provisions of Superintendency Rule 8.

Defendant was tried 296 days (charging triple jail time) after the original arrest, in derogation of R. C. Section 2945.71 (C) (2) — the 270-day rule. The state claims it is saved by the extension compliance authorized by R. C. Section 2945.72. The chronology is:

Note	Date	Action	Charged To State	Not Charged To State
1	9/19/80	Defendant arrested on Municipal Court affidavit.	3	
	9/20-10/1	Defendant on bond in Municiple Court.	11	
	10/1	Charge dismissed.		
2	10/1-10/8	No charge pending.	8	
1	10/9	Defendant arraigned following Grand Jury indictment.	3	
	10/10-10/21	Defendant on bond, Common Pleas Court.	12	
3	10/21-11/12	Defendant's motion to dismiss filed and ruled upon.		21
	11/12/80-6/10/81	Defendant awaiting trial.	211	
4	6/10-6/23	State's motion for continuance. Trial set July 7, 1981.		17
	6/17	Defendant filed motion to dismiss - speedy trial.		
5	6/23	Defendant filed motion to vacate trial date - trial set July 14.		
	7/7	Original trial date.		
	7/7-7/14	Delay per request of accused.		7
		TOTAL	248	45

NOTE 1.

The defendant is entitled to triple time credit. R. C. Section 2945.71 (E).

NOTE 2.

We reject the state's contention that *State* v. *Justice,* 49 O. App. 2d 46, 3 O.O. 3d 109, is distinguishable. In *Justice,* the same charge, upon the same facts, was filed in the same court where the original action was dismissed. Here, the original felony affidavit was filed in the Municipal Court and the second arrest following Common Pleas

Grand Jury indictment was upon the same charge, upon the same facts, in a different court. The critical issue addressed in *Justice* was:

> "We have, therefore, an identical charge growing out of an identical set of facts resulting in a trial and conviction of a defendant without the 90 day period provided by statute."
>
> *Justice,* supra.

Here, the record shows that the same charge, based upon the same facts, was filed in a different court within the same county. The identity of the court is not the critical concern, and is insignificant when measured against the purposes of the Speedy Trial Act and the rights accorded a person charged with crime in Ohio.

NOTE 3.

The defendant's motion to dismiss triggers R. C. Section 2945.72 (E) :

> "The time . . . may be extended only by the following:
>
> (E) Any period of delay necessitated by reason of . . . motion, proceeding, or action made or instituted by the accused."

We hold that the accused's motion to dismiss tolls the clock. It is not necessary for the state to prove, or the court to affirmatively find, that such motion, standing alone, delayed the proceeding. *State* v. *Walker,* 42 O. App. 2d 41, 71 O.O. 2d 238.

State v. *Tope,* 53 Ohio St. 2d 250, 7 O.O. 3d 408 (1978), cited by the appellant, is facially irrelevant.

NOTE 4.

The state was granted an *ex parte order* continuing the trial date because an unnamed witness would suffer a hardship arising out of a pre-planned and paid-for vacation. This continuance does not run afoul of the Ohio Supreme Court's interpretation of R. C. Section 2945.72 (H), last clause.

Elmwood Place v. *Denike,* 56 Ohio St. 2d 427, 10 O.O. 3d 528 (1978), stands for the proposition that when delay is facially unreasonable, the record must affirmatively show sufficient facts to support the reasonableness of the order. Here, the delay is not facially unreasonable.

In *State ex rel. Atkins* v. *Denton* 63 Ohio St. 2d 192, 17 O.O. 3d 118 (1980), the court held that a second continuance for unavailability of a witness demonstrated a prosecutorial lack of diligence and the continuance was not reasonable. Here, we have no evidence of lack of diligence by the state.

NOTE 5.

At the request of the defendant on June 23, 1981, the trial court granted, on June 30, the motion and continued the trial to July 14 from July 7. In his motion, the defendant sought to cling to his speedy trial request, at the same time asserting personal trial schedule conflicts. The delay from July 7 to July 14 does not count against the state. Revised Code Section 2945.72 (H).

The period from filing to ruling is also not chargeable to the state. Revised Code Section 2945.72 (E).

Finally, we find that the trial, 296 days after the original arrest, does not entitle the defendant to dismissal pursuant

to Superintendency Rule 8. *State* v. *Westbrook,* 47 O. App. 2d 211, 1 O.O. 3d 284 (1975).

> "A further point to be considered is the fact that Superintendency Rule 8 (B) has no condition specifying that failure of compliance justifies the discharge of an accused."
>
> *State* v. *Lacy,* 46 O. App. 2d 215, 75 O.O. 2d 376 (1975).

The first Assignment of Error is overruled.

II.

Did the court err in overruling the defendant's motion for acquittal?

Although the defendant might have been charged with other offenses arising out of the conduct found by this jury, the evidence supports the finding that the hope of forbearance to prosecute is a "valuable benefit" within the penumbra of Revised Code Section 2921.02. See *State* v. *Lieberman,* 114 O. App. 339 (1961).

The second Assignment of Error is overruled.

III.

The verdict and judgment is supported by competent, corroborated evidence, and is not against the weight of the evidence.

The third Assignment of Error is overruled.

IV.

The admission of testimony regarding the liquor law violation was clearly within the discretion of the trial

judge. It had a bearing upon credibility and was offered for purposes of impeachment.

The fourth Assignment of Error is overruled.

V.

The admission of a photograph of the "scene" without elaborate foundation was not prejudicial. See Evidence Rule 901 (A) and 1008.

The fifth Assignment of Error is overruled.

VI.

The defendant's counsel was permitted to make substantially the same comment he now claims was later denied to his prejudice. See Record-402, 403, and 404.

We find, upon an examination of the entire final argument, that the trial court properly controlled the argument, and that his ruling was neither an abuse of discretion nor prejudicial to the defendant.

The sixth Assignment of Error is overruled.

The verdict and judgment of the Coshocton County Court of Common Pleas is affirmed.

Henderson, P.J., and

Putman, J., concur

/s/ JOHN R. MILLIGAN
/s/ NORMAN J. PUTMAN
/s/ ROBERT E. HENDERSON
JUDGES

IN THE COURT OF APPEALS FOR
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

vs.

NED LUTZ,
Defendant-Appellant.

JUDGMENT ENTRY

(Filed July 12, 1982)

CASE NO. CA-81-18

For the reasons stated in the Memorandum-Opinion on file, all Assignments of Error are overruled, the verdict and judgment of the Coshocton County Court of Common Pleas is affirmed, and this cause is remanded to that court for execution of sentence.

/s/ JOHN R. MILLIGAN
/s/ NORMAN J. PUTMAN
/s/ ROBERT E. HENDERSON
JUDGES

APPENDIX B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1982 TERM
City of Columbus.) To wit: October 6, 1982

No. 82-1210

STATE OF OHIO,

Appellee,

vs.

NED LUTZ,

Appellant.

APPEAL FROM THE COURT OF APPEALS
for Coshocton County.

This cause, here on appeal as of right from the Court of Appeals for Coshocton County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Coshocton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this . . . . day of . . . . . 19 . . . .
. . . . . Clerk
. . . . . Deputy

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO,) 1982 TERM
City of Columbus.) To wit: October 6, 1982

No. 82-1210

STATE OF OHIO,

Appellee,

vs.

NED LUTZ,

Appellant.

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Coshocton County.

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Robert L. McCarty.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this . . . day of . . . . . 19 . . . .
. . . . . Clerk
. . . . . Deputy

Office - Supreme Court
FILED
JAN 2 1983
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NED LUTZ,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

(ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF OHIO)

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Pages

Table of Authorities ii
Statement of the Case 1
Summary of Argument 2
Argument 3
Conclusion 6
Certificate of Service 7

TABLE OF AUTHORITIES

STATUTES CITED: **Pages**

Amendment VI, United States Constitution 4
Amendment XIV, United States Constitution 4
Ohio Revised Code, Section 2945.72(E) 5, 6
Ohio Revised Code, Section 2945.72(H) 4, 6
Rules of Superintendence of the Supreme Court of Ohio, Rule 8(B) 5, 6
Supreme Court Rule 17 3

CASES CITED:

Barker v. Wingo, 407 U.S. 514 (1972) 5
Elmwood Place v. Denike, 56 Ohio St.2d 427, 10 Ohio Op. 3d 528, 384 N.E.2d 707 (1978) 4
Moore v. Arizona, 414 U.S. 25 (1973) 5
State v. Lacy, 46 Ohio App.2d 215, 75 Ohio Op. 2d 376 (1975) 6
State v. Martin, 56 Ohio St.2d 289 (1978) 5
State v. Reeser, 63 Ohio St.2d 189, 407 N.E.2d 25 (1980) 5
State v. Walker, 42 Ohio App.2d 41, 71 Ohio Op.2d 238 (1974) 5
State v. Westbrook, 47 Ohio App.2d 211 (1975) 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-922

NED LUTZ,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION

(ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF OHIO)

STATEMENT OF THE CASE

The following statement of the case is necessary to correct the omissions in the statement of the petitioner.

While petitioner's motion to dismiss the indictment filed on June 17, 1981, was pending before the trial court, petitioner filed a motion on June 23, 1981, to vacate the July 7, 1981, trial date. The trial court granted this motion and reassigned the case for hearing on July 14, 1981, at which time the trial commenced. Except for parts of two days, petitioner has been free on bond during the entire proceedings.

On July 13, 1981, the trial court overruled the petitioner's motion to dismiss filed June 17, 1981.

The defendant was found guilty by a jury and was sentenced to confinement in an Ohio penitentiary for a term, the minimum of which would be one (1) year, the maximum of which would be ten (10) years. However, the sentence of imprisonment in the Ohio penitentiary was

suspended and the defendant was placed on probation for a period of five (5) years ending September 14, 1986. As a term of that probation, the defendant was sentenced to be incarcerated in the Coshocton County Justice Center for a period of sixty (60) days.

Defendant filed a Notice of Appeal on September 15, 1981. The Court of Appeals for Coshocton County, Ohio, Fifth Appellate District, by Judgment Entry filed July 12, 1982, overruled all six assignments of error alledged by the defendant and the verdict of judgment of the Coshocton County Court of Common Pleas was affirmed.

The defendant appealed the decision of the Court of Appeals to the Ohio Supreme Court by Notice of Appeal timely filed July 26, 1982. On October 6, 1982, the Ohio Supreme Court dismissed the appeal for the reason that no substantial constitutional question existed.

On October 6, 1982, the Ohio Supreme Court overruled petitioner's Motion for Leave to Appeal from the Court of Appeals for Coshocton County.

This matter is now before this court on a petition for writ of certiorari from the Supreme Court of Ohio.

SUMMARY OF ARGUMENT

The question presented fails to rise to the level of a substantial federal question and the matters raised have already been addressed by this Court.

The continuance granted respondent was reasonable and therefore was a proper extension of a trial time.

Any period of delay necessitated by petitioner's motion to dismiss is a proper extension of trial time.

The Ohio Rules of Superintendence do not deal with the substantive rights in this case which are prescribed by statutes which are controlling.

ARGUMENT

Supreme Court Rule 17 provides in pertinent part:

"Rule 17. Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered . . . . .

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In the instant case, the Ohio Supreme Court has not decided any federal question in conflict with any other state court of last resort or of a federal court of appeals. Further, all important questions of federal law which petitioner alludes to in his petition have already been settled by this Court. The petitioner has failed to raise a substantial federal question and pursuant to the guidelines set forth in Supreme Court Rule 17, this Court should deny the petition for writ of certiorari.

Respondent was granted an ex parte order continuing the trial date twenty-one days because an important unnamed State's witness would suffer a hardship for himself and ten other people arising out of a preplanned and paid-for

vacation trip out of the United States during the scheduled trial date of June 16, 1981. When the respondent became aware of this fact on June 9, 1981, it filed a Motion for Continuance the next court day.

On June 10, 1981, 248 of Ohio's 270 days had elapsed when respondent sought and was granted a continuance from June 16, 1981 to July 7, 1981 on the grounds that a material and critical State's witness would be caused hardship by the June 16, 1981 trial date. There was full compliance with the Ohio statutory speedy trial scheme which is one of the most rigorous and protective in this nation.

The absence of prejudice to the petitioner is best demonstrated by petitioner's request for continuance from July 7, 1981 to July 14, 1981.

This Court has consistently recognized the applicability to the States of the 6th Amendment speedy trial provisions via the due process clause of the 14th Amendment; however, petitioner neither suggests prejudice nor proffers any arguments in support thereof. Petitioner is asking the Court to set aside the Ohio Supreme Court's interpretation of the Ohio speedy trial statutes and substitute its interpretation of such statutes. This is requested since petitioner cannot make his case rise to a federal constitutional level.

The Ohio Supreme Court reviewed a number of cases dealing with Section 2945.72 (H) R.C. in *Elmwood Place v. Denike*, 56 Ohio St. 2d 427, 10 Ohio Op. 3d 528, 384 N.E. 2d 707 (1978), and stated that an initial determination must be made as to whether a delay of trial is facially unreasonable and only then would the record need to affirmatively show sufficient facts to support the reasonableness of the order. Under the guidelines set down by the court in *Denike*, supra, the continuance was not facially unreasonable. Additionally, the facts set forth in respondent's memorandum attached to the motion for continuance provided the record with sufficient detail to

demonstrate the necessity and reasonableness of the continuance.

In the present case, unlike *State v. Reeser*, 63 Ohio St.2d 189, 407 N.E.2d 25 (1980), there was no ploy by the respondent or the trial court to undercut the statutory requirements.

The respondent informed the Court in the memorandum that the witness in question would be back in the United States and Coshocton County, Ohio by June 22, 1981, and that a trial date after that time would relieve that witness's hardship and still comply with Ohio's statutory trial time of 270 days. The respondent was in good faith attempting to try the case within the time limits established by the Ohio Revised Code.

When the actions of the respondent and the trial court are weighed in light of the factors set forth by this Court in *Barker v. Wingo*, 407 U.S. 514 (1972) and *Moore v. Arizona*, 414 U.S. 25 (1973), it is clear that petitioner's right to a speedy trial were protected and no prejudice befell the petitioner.

The filing of the motion to dismiss by petitioner on October 21, 1980, tolls the time running against the respondent without the necessity of the court affirmatively finding, or the respondent proving, that the motion, standing alone, delayed the proceedings, *State v. Walker*, 42 Ohio App. 2d 41, 71 Ohio Op.2d 238 (1974). The time between the filing of the motion by the petitioner and the disposition of that motion is the delay necessitated by reason of said motion.

State v. Martin, 56 Ohio St. 2d 289 (1978), cited by the petitioner at Page 8 of his Petition for Writ of Certiorari, clearly supports the proposition that the filing of the motion to dismiss by the petitioner would extend the time for trial pursuant to 2945.72(E)R.C.

Rule 8(B) of the Rules of Superintendence of the Supreme Court of Ohio does not deal with the substantive rights of the petitioner which are prescribed by statutes

relating to rights to speedy trial and discharge. Those statutes deal with the substantive rights of an accused and take precedence over procedural or Superintendency Rules of the State Supreme Court. *State v. Westbrook*, 47 Ohio App.2d 211 (1975).

In addition, Superintendency Rule 8(B) has no condition specifying that failure of compliance justifies the discharge of an accused. *State v. Lacy*, 46 Ohio App. 2d 215, 75 Ohio Op.2d 376 (1975).

CONCLUSION

For the reasons stated, the question presented fails to rise to the level of substantial federal question and as any constitutional issues raised by the petitioner have already been addressed by this Court. The matter raised is of little public importance.

The continuance granted respondent was reasonable under the circumstances and therefore a proper extension of trial time under Section 2945.72(H) R.C.

Where petitioner filed a motion to dismiss, any period of delay necessitated by reason of that motion qualified as a proper extension of trial time under Section 2945.72(E) R.C.

Rule 8(B) of the Ohio Supreme Court's Superintendence Rules does not deal with the substantive rights of petitioner which are prescribed by statutes relating to rights to speedy trial and discharge.

Wherefore, respondent respectfully submits that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Opposition was served upon the Counsel for Petitioner, James R. Cooper, Esquire, Morrow, Gordon & Byrd, 33 West Main Street, P.O. Box 816, Newark, Ohio 43055, by United States Regular Mail this 4th day of January, 1983.

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